Re MALAY NATIONAL BANKING CORPORATION LIMITED

[O.C.J. (Wilson J.) January 13, 1956]

[K. L. — Companies (Winding-up) No. 3 of 1952]

Companies Ordinance, 1940 ss. 173(2) & 254 — Winding-up — Bankruptcy — Proof — Judgment debt — Evidence.

On the 27th October, 1952, the Collector of Stamp Duties for and on behalf of the Government of the Federation of Malaya filed a winding up petition against the Malay National Banking Corporation Ltd. On an application by the petitioner, by way of Summons, the Official Receiver was appointed provisional liquidator by the Court on the 3rd November, 1952. On the same day, that is to say, the 3rd November 1952, in a civil suit, Mohamed Store, the applicant in these proceedings, obtained a judgment in default of appearance against the Corporation for $35,321.62. There was evidence that the said Mohamed Store had knowledge of the petition to wind up the Corporation. On the 16th January, 1953, the winding-up order was accordingly made and the Official Receiver was appointed liquidator thereof. Subsequently, the said Mohamed Store lodged with the liquidator a proof for $35,592.05 in respect of cheques drawn by them and not paid by the Corporation and for damage to their reputation and credit and costs in the aforesaid suit, which proof was rejected to the extent of $30,000.00. The applicant applied, by way of motion, that the proof for the sum of $35,592.05 should be admitted in full.

Section 254 of the Companies Ordinance, 1940, provides, *inter alia*, that "in the winding up of an insolvent company the same rules shall prevail and be observed in regard to the respective rights of secured and unsecured creditors and the debts provable as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."

Section 173(2) of the Companies Ordinance, 1940, provides that the winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up.

Section 41 of the Bankruptcy Enactment provides in effect that a bankruptcy when declared relates back to the first act of bankruptcy during the twelve months prior to the making of an adjudication order.

Held: as the only evidence of the debt was a judgment and the judgment was obtained after the commencement of the winding-up, the judgment debt cannot be proved.

The principle in **Ex parte Bonham, In re Tollemache**(1) applied.

Per curiam: In these circumstances, it is doubtful whether any part of the proof of Mohamed Store in the winding-up should have been allowed.

Case referred to:—

(1) *Ex parte Bonham, In re Tollemache* (1885) 14 Q.B.D. 605.

COMPANIES WINDING-UP.

J. Bentley for the applicant.

The Official Receiver in person for the respondent.

Wilson J.: — On the 27th October, 1952, a petition was filed in this Court by the Collector of Stamp Duties for and on behalf of the Government of the Federation of Malaya for the winding-up of the Malay National Banking Corporation Limited. On the 31st October, 1952, a summons was issued on the application of the petitioner for an order that the Official Receiver should be appointed provisional liquidator of the Company and the application was set down for hearing on the 3rd November, 1952. On the same day, the 3rd November, 1952, Mohamed Store, the plaintiff in Civil Suit No. 279 of 1952, obtained judgment against the Malay National Banking Corporation Limited for $35,321.62 with interest and costs, the defendant not having entered an appearance in the action. Later, and probably a few minutes after the judgment was granted, and at any rate on the same day, a provisional liquidator was appointed. It is quite clear from paragraph 7 of the affidavit of Mr. Peddie dated the 14th October, 1955, that the plaintiff in Civil Suit No. 279 of 1952 had knowledge of the petition to wind up the Malay National Banking Corporation Limited. On the 16th January, 1953, an order was made to wind up the Malay National Banking Corporation Limited and the Official Receiver was appointed liquidator thereof. On the 25th March, 1953, Mohamed Store, in response to an advertisement, lodged with the liquidator a proof for the sum of $35,592.05 in respect of cheques drawn by them and not paid by the Banking Corporation and for damage to their reputation and credit and costs in the Civil Suit No. 279 of 1952. By a notice dated the 27th September, 1955, the Official Receiver as liquidator gave notice that he had rejected the claim of Mohamed Store to the extent of $30,000, and gave his reasons for the rejection. By a notice of motion dated the 18th October, 1955, Mohamed Store applied for an order that the decision of the Official Receiver should be varied and that it should be ordered that the proof for the sum of $35,592.05 should be admitted in full.

This motion was argued before me at considerable length and with considerable ability by Mr. Bentley on behalf of Mohamed Store and by the Official Receiver. However, after considerable reflection, I have come to the conclusion that the answer to this dispute is comparatively simple. In section 254 of the Companies Ordinance, 1940, as applied to the Malayan Union by Malayan Union Ordinance No. 13 of 1946, it is provided *inter alia* that "in the winding-up of an insolvent company the same rules shall prevail and be observed in regard to the respective rights of secured and unsecured creditors and the debts provable as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." By section 173(2) of the Companies Ordinance the winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up. Under the bankruptcy law a bankruptcy when declared relates back to the first act of bankruptcy during the twelve

months prior to the making of an adjudication order. In the case of *Ex parte Bonham, In re Tollemache*[1], the Master of the Rolls stated: — "I am prepared to lay this down, that when the only evidence of a debt is a judgment, and the judgment has been recovered after the act of bankruptcy, the judgment debt cannot be proved in the bankruptcy." This decision is, in my opinion, applicable to the law of bankruptcy in force in the Federation. In this case the only evidence before the Official Receiver of the debt in respect of which the proof was lodged was the judgment of this Court in Civil Suit No. 279 of 1952. This judgment was obtained after the petition to wind up the Malay National Banking Corporation Limited was presented, and if it is material the judgment in default was obtained by Mohamed Store subsequent to the date of the presentation of the petition with the knowledge of Mohamed Store that a petition had been presented. In these circumstances I am doubtful whether any part of the proof of Mohamed Store in the winding-up should have been allowed. However that may be, I am satisfied that the Official Receiver was acting within his legal rights in rejecting the proof to the extent of $30,000.

As I have already said, the case was argued at some length and many cases were cited to me on other points arising out of the rejection by the Official Receiver, but having regard to the conclusion to which I have come I do not think it necessary for me to refer to any of the other points raised on the hearing of this motion or to the cases cited in support of the arguments.

The motion is dismissed with costs.

Motion dismissed.

Solicitors: *Shearn Delamore & Co.*

Re CHEW KEAN KOR

[O. C. J. (Spenser Wilkinson J.) September 9, 1955]

[Penang — Bankruptcy No. 46 of 1954]

Bankruptcy —Duty of Official Assignee to realise debtor's assets for the benefit of creditors — Discretion.

It is the duty of the Official Assignee to realise the debtor's assets for the benefit of creditors, and the Court will not interfere with the discretion of the Official Assignee even at the instance of a creditor, unless his actions are so utterly unreasonable and absurd that no reasonable man would so act.

Case referred to:—

(1) *Ex p. Lloyd, Re Peters* 47 L.T. 64.

BANKRUPTCY MOTION.

Debtor in person.

Balwant Singh (Asst. Official Assignee) for the Official Assignee.

Spenser Wilkinson J.: — This was a motion by the debtor for an order restraining the Assistant Official Assignee from selling by public auction certain lands belonging to the debtor.

As I understand the law of bankruptcy it is the duty of the Official Assignee to realise the debtor's assets for the benefit of creditors, and the Court will not interfere with the discretion of the Official Assignee even at the instance of a creditor, unless his actions are so utterly unreasonable and absurd that no reasonable man would so act (see *Ex parte Lloyd, Re Peters*[1]).

The debtor was unable to adduce any good reason why his property should not be sold. He made a rather vague suggestion that he had asked some friend in Thailand to send him money to enable him to settle with his creditors, but it did not appear to me that there was any reasonable prospect that this friend either could or would supply this money within a reasonable time.

It appeared to me, therefore, that there was no good reason for this Court to interfere with the discretion of the Official Assignee and I, therefore, dismissed the application with costs.

Application dismissed.

CHEW KOW HIN v. WEE TRADING & CO.

[O. C. J. (Spenser Wilkinson J.) September 9, 1955]

[Penang — Civil Suit No. 15 of 1955]

Contract — c.i.f. Contract — Construction — Whether in c.i.f. contract the seller may tender goods instead of documents.

In this case the plaintiff claimed for the price of goods bargained and sold, to wit fountain pens. The defence was that the contract in question was a c.i.f. contract and that the plaintiff having failed to deliver to the defendants the proper shipping documents was not entitled to recover.

Held: under a c.i.f. contract a tender of the proper documents is essential and the seller is not at liberty to tender the goods instead of the documents.

In a mercantile contract where words are partly printed and partly typed the typed words are to be looked upon as the better indication of the intentions of the parties.

CIVIL SUIT.

Lee Thean-Chu for the plaintiff.

Sonni Pillai for the defendants.

Spenser Wilkinson J.: — The claim in this case was for the price of goods bargained and sold, the goods in question being 600 fountain pens with chromium plated nibs and 600 fountain pens with 14 carat gold nibs. The contract sued upon is contained in an indent, which is a printed form containing the